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Torts - Liability of Joint Tort-feasors

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TORTS—LIABILITY OF JOINT TORT-FEASORS—Water from the slush pits on defendants' drilling rig inundated plaintiff's land causing considerable damage. Defendants contended, *inter alia,* that some of the water had come from another oil company's rig and from the tanks of the municipal water company and for this reason the plaintiff's injury could not be chargeable entirely to them. *Held,* that even if defendants' contentions were correct they could not escape liability for the entire damage because at best they were joint tort-feasors and as such were liable *in solido.*[1] *Eagen v. Tri-State Oil Co.,* 183 So. 124 (La. App. 1938).

In the common law states as well as in Louisiana it is well established that joint tort-feasors are liable *in solido.*[2] The real problem is presented by the question: Who are joint tort-feasors? The courts have given conflicting answers to this question. According to English common law, defendants in a tort action could not be joined unless they were joint tort-feasors, and only those who had acted in concert were considered as such.[3] The early American cases followed this rule.[4] When the various states adopted code pleading, however, parties who had not acted in concert (but whose concurrent acts had united to cause the damage) could be joined in the same action. They were inadvertently called "joint tort-feasors" and held liable *in solido* through the failure of the courts to distinguish between procedural law and substantive liability.[5] This explains in part the lack of complete uniformity.

At present the majority of courts follow the rule that, *in the absence of concert of action,* defendants are liable *in solido* only in the following situations: (1) where the act of *either* would have caused the entire damage independently of the other,[6] (2) where the act of *neither* would have caused *any* damage in the

1. Art. 2324, La. Civil Code of 1870: "He who causes another person to do an unlawful act, or assists or encourages in the commission of it, is answerable, in solido, with that person, for the damage caused by such act." (Note that this article seems to contemplate concert of action.)

2. Salmond, Torts (6 ed. 1924) 83.

3. Thompson v. The London County Council, [1899] 1 Q. B. 840 (defendant excavated near plaintiff's house and damage was caused when the water company left their water main partly open).

4. Buddington v. Shearer, 37 Mass. 477 (1838); Little Schuylkill Navigation, Railroad, and Coal Co. v. Richards, 57 Pa. 142, 98 Am. Dec. 209 (1868) (defendants threw dirt and coal dust into a stream causing damage to plaintiff's dam).

5. See Prosser, Joint Torts and Several Liability (1937) 25 Calif. L. Rev. 413, and authorities cited.

6. Anderson v. Minneapolis St. P. & S. S. M. Ry. Co., 146 Minn. 430, 179 N.W. 45 (1920); Harper, Torts (1933) 677, § 302, and cases cited.

absence of the other's wrongdoing.[7] An analysis of the cases shows that in holding such defendants liable *in solido* the courts arrive at essentially the same result that they would have accomplished under the old common law rule where the question of solidary liability was not considered. In both of the above situations, if each defendant had been sued individually for his separate act, he would have been liable for the entire damage. Since this is likewise the consequence of solidary liability, the results for practical purposes are the same.

In the first situation (where the act of either would have caused the entire damage), it is obvious that neither can escape liability for the entire damage because *each caused the entire damage*. What the courts call solidary liability under this state of facts is nothing other than *concurrent* liability.[8] The reason given for holding the defendants liable *in solido* is that if one escaped solidary liability the other would, with equal reason, escape such liability.[9] This reason lacks cogency since solidary liability has no application where the act of one defendant caused all the damage.

In the second situation (where the act of neither was alone sufficient to cause the damage), solidary liability is imposed to escape a paradox for, since the act of each caused no harm by itself, it is impossible to attribute to any defendant his proportionate share of liability. If one defendant were allowed to escape liability because his act alone could not have caused any damage, each defendant would escape for the same reason and the injured party would have no remedy. To cut the Gordian knot, the courts impose solidary liability upon each defendant.[10]

Where the act of each party would have caused *some* damage in the absence of the act of the other, there does not exist any valid reason for imposing solidary liability. It cannot be said that defendants are concurrently liable for the whole damage because

7. Washington & Georgetown Railroad Co. v. Hickey, 166 U.S. 521, 17 S.Ct. 661, 41 L.Ed. 1101 (1897); Citizens Telephone Co. v. Prickett, 189 Ind. 141, 125 N.E. 193 (1919); Johnson v. Northwestern Telephone Exchange Co., 48 Minn. 433, 51 N.W. 225 (1892) (one defendant maintained an unsafe pole, the other cut the guy wire).

8. The Koursk [1924] P. 140, 150. "It is no doubt quite common to speak of each of separate tort-feasors as joint tort-feasors in the sense that where each has contributed to the injury complained of, each is liable for the whole of the damage done. In my opinion the use of the expression in such circumstances is inaccurate and misleading."

9. Anderson v. Minneapolis St. P. & S. S. M. Ry. Co., 146 Minn. 430, 179 N.W. 45 (1920).

10. Washington & Georgetown Ry. Co. v. Hickey, 166 U.S. 521, 17 S.Ct. 661, 41 L.Ed. 1101 (1897).

neither caused the whole. Nor can it be said that liability must be imposed upon both to prevent a complete escape by each one. Liability may be imposed upon one for the damage he actually caused, without in any way affecting the liability of the other who is likewise responsible for his share. The fact that the damage may be difficult to apportion does not justify condemning a defendant for more damage than he in fact caused. If there exists even a theoretical basis for making an apportionment, this should be done and each defendant held liable for his share. Such is the rule of the majority of American courts.[11]

In French law, joint tort-feasors are liable *in solido*.[12] But in cases where the independent acts of each caused a portion of the damage each is liable only for his share.[13] Even when the defendants have acted in concert, the liability will not be solidary if the court can apportion the damages.[14] In fact the judgment condemning the defendants solidarily may also apportion the respective shares of responsibility.[15]

For the broad principle enunciated in the instant case, the court found its authority in *Williams v. Pelican Natural Gas Co.*,[16] where three different oil companies, by emptying salt water into a stream which ran through plaintiff's land, had caused damage to his timber and were held liable *in solido*. It is submitted that this decision is erroneous and should not have been followed. The court should have undertaken to apportion the damage among the several wrongdoers. Such a decision would have been in accord with French jurisprudence and with the holdings of the vast majority of common law jurisdictions. More-

11. Masonite Corp. v. Burnham, 164 Miss. 840, 146 So. 292, 91 A.L.R. 752 (1933).

12. 2 Mazeaud, Responsabilité Civile (3 ed. 1939) 880, nº 1944; 4 Aubry et Rau, Cours de Droit Civil Français (5 ed. 1902) 33, nº 298*ter*, note 14; 2 Planiol, Traité Elémentaire de Droit Civil (10 ed. 1926) 315, nº 900; 2 Colin et Capitant, Cours Elémentaire de Droit Civil Français (8 ed. 1935) 395, nº 421; Cass. ch. req. 27 décembre 1921, Dalloz, 1922.1.109.

13. 2 Mazeaud, op. cit. supra note 12, at 885, nº 1948; Cass. ch. civ. 31 décembre 1902, Dalloz, 1903.1.126.

14. Cass. ch. civ. 15 juillet 1895, Dalloz, 1896.1.31,32: "Whereas it does not suffice, in order that solidarity be pronounced in a case of responsibility resulting from a quasi-delict, that the fault be declared common to a certain number of defendants; [that] it must in addition be established that this fault is in such a manner indivisible that any division between those who have committed it is impossible;—whereas the judgment under attack not only does not establish that impossibility, but from the terms used it appears that responsibility was deemed susceptible of being divided and apportioned according to the part each one of the co-authors had had in the common fault." (Translation supplied.)

15. Cass. ch. req. 5 juillet 1926, Dalloz, Heb. 1926.1.401.

16. 187 La. 462, 175 So. 28 (1937).

over, in view of the fact that, in Louisiana, joint tort-feasors are not entitled to contribution unless they be co-judgment debtors,[17] such a disposition of the case would appear to be more equitable. Nevertheless, some justification may be found for the court's decision in that apportionment often works hardship on the innocent injured party. This is particularly true where one or more of the defendants is financially irresponsible.[18] Equitable loss distribution, while it is ideal, is nevertheless a very difficult and complex matter.

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17. Aetna Life Ins. Co. v. DeJean, 185 La. 1074, 171 So. 450 (1936), noted in (1938) 1 LOUISIANA LAW REVIEW 235.

18. See Prosser, supra note 6; Gregory, Loss Distribution by Comparative Negligence (1936) 21 Minn. L. Rev. 1; Gregory, Legislative Loss Distribution in Negligence Actions (1935), cited in Cowan, The Riddle of the Palsgraf Case (1938) 23 Minn. L. Rev. 46.